Supreme Court, U.S.
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No. 96-828

In The

Supreme Court of the United States

October Term, 1996

DRY CREEK RANCHERIA,

Petitioners,

vs.

BRIDGET and LUCY R., JAMES R. and COLETTE R. and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

JAMES R.'S AND COLETTE R.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the question of whether Bridget and Lucy R. are "Indian" children within the meaning of the Indian Child Welfare Act ("ICWA") be properly presented to this Court when the California state court has not finally decided this question but has remanded the case to a state trial court to hear evidence and make findings of fact regarding the political, cultural and social relationship between the children's biological father and the Indian Tribe which claims an interest in these children?

2. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., creates a race-based classification which deprives them of Equal Protection under the Fifth and Fourteenth Amendments be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop the missing factual record?

3. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., denied these particular children of partial Indian descent Due Process of law under the Fifth and Fourteenth Amendments be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop the missing factual record?

QUESTIONS PRESENTED – Continued

4. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., exceeds the scope of Congress' powers under the Indian Commerce Clause and is violative of the Tenth Amendment be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop a factual record regarding the twins' biological father's asserted relationship, if any, to the Tribe?

5. Whether this Supreme Court has jurisdiction under 18 U.S.C. section 1257 to render an advisory opinion as to the issue of whether the due process rights of Bridget and Lucy R. require a guardianship hearing in the event the trial court on remand finds the twins are "Indian" children within the meaning of the ICWA.

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UNITED STATES:

Respondents and adopting parents, James and Colette R., by and through their counsel of record, hereby answer and oppose the petition for writ of certiorari filed by the intervenor, Dry Creek Rancheria of Pomo Indians. The R.s respectfully request this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, in this case.

INTRODUCTION

This case concerns the interplay between the federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq. ("ICWA")) and California state adoption and parental rights law in the context of a voluntary, agency adoption valid under California law. James and Colette R. are the adoptive parents of twin girls, Bridget and Lucy R. The girls are 3/32 American Indian through their biological father, Richard A. According to the record developed so far, neither the girls nor Richard have ever lived on a reservation, nor has Richard had any significant social, cultural or political relationship with the tribe or with Indian cultural life. The Court of Appeal correctly understood the ICWA was never meant to apply to situations such as this, and ruled application of the Act to this type of case unconstitutional, holding:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a

> significant social, cultural or political relationship with their tribe." (*In re Bridget R.*, 41 Cal.App.4th 1483, 1492, 49 Cal.Rptr.2d 507 (1996).)

However, recognizing the factual record regarding the biological father's asserted relationship with the tribe was incomplete because the trial court precluded any inquiry into this area, the Court of Appeal then remanded the matter to the trial court for an evidentiary hearing on the factual question of whether or not the twins' biological parents "had such a relationship at the time that they voluntarily acted to relinquish their parental rights under California law." (*Ibid.*)

Not only is the Court of Appeal's legal conclusion correct and in accord with numerous recent cases emanating from this Supreme Court, the key federal issues in this case are still to be determined on remand. Therefore, there is no final judgment as required for Supreme Court jurisdiction pursuant to 28 U.S.C. section 1257, subdivision (a). This case is not yet in the proper posture for a grant of a writ of certiorari. This Supreme Court denied the petition for writ of certiorari filed by the biological parents raising identical issues, Docket Number 96-5971, on January 6, 1997. The tribe's petition should be denied as well.

STATEMENT OF THE CASE

Initial Placement for Adoption

The twin girls, Bridget and Lucy R., were born on November 9, 1993, in West Covina. (CT 3077 & 3081.[1])

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[1] "CT" refers to the 19-Volume Clerk's Transcript filed on or about August 9, 1995. "RT1" refers to the 5-Volume Reporter's Transcript Appellants filed in support of their Petition for Writ of Supersedeas. "RT" refers to the 236-page

Cindy is the biological mother of the girls, and Richard is listed on their birth certificate as the father. (*Ibid.*) Richard was 23 years old. He was born April 11, 1972. (CT 3094.) The R.s took the twins home to Ohio after their birth. (CT 2040-2044, RT1 408.) On May 4, 1994, the R.s filed a petition to adopt Bridget and Lucy in Ohio. (Jud. Ntc. Ex. 1.)

When Cindy was about six or seven months pregnant, she and Richard decided to place the children for adoption. (RT1 620.) Attorney Durand Cook first met with Cindy and Richard in August 1993. (RT1 889.) He learned Cindy had Indian heritage but then learned the tribe in question was a Mexican tribe. (RT1 895-896.) Cook testified he asked Richard if he had any Indian heritage, and Richard replied, "No." (RT1 896.) Richard did not tell him he was a tribal member at any point prior to the twins' birth. (RT1 897.) He denied encouraging either of the birth parents to lie about their heritage. (RT1 897.) Cook testified he first learned of an Indian heritage issue in February or March 1994. (RT1 899.)

However, Cook later testified on one intake questionnaire Cindy had written Richard was a portion American Indian and Cook had written "Pomo." (RT1 1025-1027, 1055-1057, see CT 2080.) He did not disclose this to the R.s. (RT1 1027.) Cook "explained what the ramifications would be if there was an Indian heritage issue, and what steps that we would need to take to clear that if they wished to place their children for adoption." (RT1 1081-1082.) He also asked them direct questions, and the

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Reporter's Transcript filed on or about August 11, 1995. Instead of complying with Appellants' designation of reporter's transcript on appeal (CT 1913), the Superior Court prepared a Reporter's Transcript containing transcripts of only those proceedings not previously filed with the Court of Appeal. "RTC" refers to the corrected transcript supplying a missing page which was filed concurrently with the Opening Brief.

"gist" of his conclusion was "that Cindy had Indian heritage, but the Indian heritage, based on her discussion and her mother's discussion, was definitely of Mexican ancestry, and that Richard had no Indian heritage, regardless of what was on the intake questionnaire." (RT1 1082.) He asked Richard who "answered there were [sic] no Indian heritage." (RT1 1083 & RT1 1079.)

Signing of Relinquishment Forms

During the ninth month of Cindy's pregnancy, she and Richard met with a social worker from Vista Del Mar Child and Family Services ("Vista Del Mar"), an adoption agency. (*Ibid.*) On November 11, 1993, two days after the twins' birth, Richard signed relinquishment documents at Vista Del Mar's offices, by which he relinquished and surrendered the twins for adoption with the intent they be placed for adoption with James and Colette R. (CT 2876-2878, RT1 622-623.) He understood that, once he signed the relinquishments, he would have no further rights to the children. (RT1 623-624.)

He signed of his own free will. (RT1 665-666.) When he signed, he understood he was intending to give up all parental rights to Bridget and Lucy. (RT1 680-681.) The forms recited: "I/We fully understand that in all other circumstances [other than if the children were not placed with the R.s] when this relinquishment is filed with the headquarters office of the Adoptions Branch of the California Department of Social Services by said agency, all my/our rights to the custody, services and earnings of said minor child and any responsibility for the care and support of said minor child will be terminated." (CT 2876-2878.)

Richard wrote he wanted the children adopted because "I already have 2 kids I dont [sic] make enough money to support myself yet. I'm going to school to get a

better job. I can't not [sic] afford 2 more children nor am I ready for more kids right now." (CT 2858.)

On the form entitled "Social And Medical History – Biological Father" dated November 9, 1993, Richard listed his "customs, traditions and values that come from cultural influences: as "Irish, German, Welsh, Spanish." (CT 2894, RT1 686.) On another form for Vista Del Mar, Richard checked the "no" box next to the question "Are you, either or your parents or any other relatives an American Indian?" (CT 2856, RT1 636.) At a second place on the forms where the ethnic heritage of his parents could be noted, Richard did not check any box. (CT 2859.) Richard listed his "basic ethnic group" as "white." He did not check the box for "American Indian or Alaskan Native." Nor did he fill in anything on the line following the statement: "If American Indian or Alaskan Native, please specify name of tribe and degree of Indian blood." (CT 2857.)

Richard testified he did not disclose his Indian heritage because he did not want the adoption stopped. (RT1 636-637.) Cook told him a federal law "would just stop the case." (RT1 637.) Richard knew he was lying on the form. (RT1 651.)

On the "Information About the Birth Father" form, Richard noted his mother, Karen A., lived in West Covina, a suburb of Los Angeles, and that he had been born in West Covina as well. (CT 2854.) Richard also signed a "Witness Statement" which verified he and Cindy had been informed regarding various public assistance programs, and they were acting of their own free will. (CT 2867.) The form also contained the advisement this was "an agency adoption and that after filing the documents in Sacramento, the termination of parental rights is considered final. The child could only be returned to the birth parents upon mutual agreement between the birth parents and the Director of Community Services at Vista Del Mar Child & Family Services. It is the policy of the

Agency not to rescind adoptions after filing with Sacramento." (*Ibid.*) Richard signed another form stating he had been fully advised of his rights regarding revocation and recision of the relinquishment. (CT 2868.) The relinquishments were filed with the Adoptions Branch of the Department of Social Services on November 23, 1993. (CT 3113-3114[2].)

Enrollment of Richard, Karen and the Minors in the Tribe

The Dry Creek Rancheria of Pomo Indians ("Rancheria") has about 225 enrolled members, about 25 of whom live on the Rancheria in Northern California. (CT 3050-3951.) The tribe first learned of Bridget and Lucy on or about January 21, 1994. (CT 3051.) Karen A. submitted the twins' applications for enrollment in the Tribe on or about March 4, 1994. This was the same time Richard's application for enrollment was submitted. (CT 3052-3056.) Karen A. also submitted her own application for enrollment on or about March 4, 1994. (CT 3057.) As of November 11, 1993, neither Richard nor the twins were enrolled members. (CT 3065 & 3072.)

Richard's Lack of Contact with the Pomo Tribe

Grandmother Karen had lived in West Covina, in Southern California, for nineteen years. (CT 2754.) Karen had never voted in tribal elections. (CT 2766.) She had not held an office in the tribe. (*Ibid.*) She had not taken Richard, who was twenty-two years old at the time of the

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[2] Although there was not an opportunity to enter these documents into evidence, the acknowledgment of them by the Chief of the Adoptions Branch of the Department of Social Services constitutes an official act of the executive branch of the State of California of which the Court of Appeal was requested to take judicial notice. (Cal. Evid. Code § 452, subd. (c).)

deposition, to visit the reservation since he was "probably about seven, seven years old." (CT 2767.) Karen did not know, even approximately, how many Pomos were living in California. (CT 2775-2776.) Karen had enrolled everyone in the tribe in January because it was a period of "open enrollment" to obtain benefits. (CT 2786.)

Richard had lived in Stockton, Norwalk, Whittier, West Covina and Azusa. (CT 2377-2379.) He attended West Covina High School. (CT 2380.) As a youth he always lived in Southern California. (CT 2386.) He did not know his percentage of Indian blood. (CT 2388.) He had forgotten the name of the tribe to which he assertedly belonged. (*Ibid.*) He had never been to any tribal meetings. (CT 2389.) Richard believed he had never been to the reservation. (CT 2391.) He had never received any financial benefits from the tribe. (*Ibid.*) When asked, "What do you know about your tribe?," Richard replied, "Not very much." (CT 2393.) He believed his great-aunts spoke the Pomo dialect, but he could not remember their names. (CT 2394.) Richard did not know whether the Pomo Tribe was the same as the Dry Creek Rancheria. (CT 2493.) He did not have any idea when his mother enrolled the twins in the tribe. (CT 2509.) Richard had forgotten the name of the tribe at his deposition in December 1994. (RT1 795.)

Best Interest of the Twins and Their Bonding to the R.s

On May 23, 1995, the R.s filed a declaration of Dr. Kenneth Fineman, a clinical and forensic psychologist, in opposition to a proposed "visitation" order. (CT 886.) Dr. Fineman explained the twins "are appropriately bonded to the R[]s, perceiving them as their psychological parents. The twins are also bonded to their sister Hannah." (CT 887.) Dr. Fineman continued, "The research data available is quite clear. The R[.] twins, if transferred to strangers (those other than whom they are attached to),

will develop an attachment disorder. This attachment disorder is more likely than not to produce irreparable harm to the children. It will have significant short-term effects which include depression, anxiety, despair, health difficulties, proneness toward depression, and proneness toward physical illnesses." (CT 888.) Dr. Fineman also detailed the long-term detriment to the twins which would result if they were removed from the R.s. (*Ibid.*)

On May 24, 1995, Dr. Fineman testified the twins would suffer an attachment disorder if separated from the R.s. (RT1 406.) This would result in "anxiety, and anxiety symptoms, which can be yelling and screaming and tantruming or it can become psychotic in nature." (RT1 407.) Dr. Fineman continued: "The next step is usually despair, simply based on the fact that the child does not know where his or her primary care-givers are, and as such, the child shows signs of depression, sleeping difficulties, insomnia, social withdrawal, a proneness towards illness of various sorts, as well as proneness towards depression." (*Ibid.*) The R.s are the twins' psychological parents and are "the only parents or caregivers that the children have known since birth. . . . " (RT1 407-408.)

Cindy and Richard's other two children were living in a shelter at the time they met with Cook. (RT1 816.) The only financial support he was giving her was $20 every now and then. (RT1 819.) Cindy received AFDC for the other children. (RT1 827.) Cindy had obtained restraining orders against Richard in April 1994 (CT 2956) based on her sworn allegations Richard "has physically and verbally abused me." (CT 2961.) Cindy alleged he pulled her "hair, kicked, hit and pushed" her on March 21, 1994. (*Ibid.*) She also alleged he got drunk during the week of March 14, 1994, and hit her and shoved her down when she would not give him money. (*Ibid.*) He also broke furniture. (*Ibid.*) Cindy declared under penalty of perjury, "These kinds of incidents occurred up to 3 times

a week. The violence is extreme. Our 2 children witnessed the fighting. They also were abused by the defendant. He would pick up the children by their necks and shake them or drop them, poke them in the face, or hit them on the head. On occasion he would hurt the children out [of] anger toward me." (*Ibid.*)

Procedural History

In order to obtain a judicial resolution of the issues raised by Richard and his mother but which they had not pursued, on September 13, 1994, the R.s filed a petition to declare Bridget and Lucy free from parental custody and control pursuant to Family Code section 7822. (CT 1.) The petition alleged the biological parents had left the girls in the R.s' care continuously since November 9, 1993, with the intent to abandon them. (*Ibid.*) On October 17, 1994, the Rancheria filed a Motion to Intervene. (CT 13.) On October 20, 1994, Vista Del Mar filed a declaratory relief action to determine the applicability of the ICWA in this case, Case No. BC114849. (CT 21 & 195.)

On October 27, 1994, the R.s filed their opposition to the Rancheria's motion to intervene. (CT 28.) The R.s contended the respondents had not established by competent evidence the twins were Indian children and requested an evidentiary hearing on that issue. They also contended the ICWA did not apply because neither the twins nor Richard were part of an "Indian" family. (CT 36.) On November 3, 1994, the trial court consolidated the two cases and ruled the tribe could participate in these proceedings. (CT 127.)

On May 17, 1995, the trial court found the minors were "American Indian pursuant to the ICWA" and they were members of the Dry Creek Rancheria. (CT 885, RT1 354.) On June 6, 1995, the trial court found the relinquishments "invalid" pursuant to 25 U.S.C. section 1913, subdivision (a). (CT 1772, RT1 556.) On June 14, 1995, the

trial court ruled the ICWA was not unconstitutional and declined to recognize the existing Indian family doctrine. (CT 1856.) The court ruled, "[a]pplication of ICWA in this case preclude R[]s from going forward with state abandonment petition." (*Ibid.*) The court ordered the twins transferred to the grandmother Karen A. the next day, June 15, and appointed the A.'s temporary guardians. (CT 1856, RT1 1156.) The R.s requested the order transferring custody be stayed pending appeal, which request was denied. (CT 1856.) Karen A.'s guardianship orders were filed June 16, 1995. (CT 1873, 1874, 1876.) On June 14, 1995, the R.s filed a notice of appeal. (CT 1857.) On June 15, 1995, the R.s petitioned the Court of Appeal for a writ of supersedeas to preserve the status quo pending resolution of the appeal. After issuing a temporary stay that day (CT 1864) and after hearing oral argument on July 19, 1995, the Court of Appeal issued the stay pending appeal on July 21, 1995. On January 18, 1996, the Court of Appeal issued its opinion in which it reversed the trial court's judgment and granted the R.s' writ petition. On May 15, 1996, the California Supreme Court denied petitions for review which had been filed by the biological parents and the tribe.

Richard and Cindy petitioned for certiorari in this Supreme Court, which petition was denied January 6, 1997, case number 96-5971.

SUMMARY OF ARGUMENT

The petition should be denied because there is, as of yet, no final judgment in the California courts ruling as to whether or not the twins are "Indian" children within the meaning of the ICWA. That matter was left for a trial court's determination on remand. Until that determination has been made, the ICWA issues in this case are not ripe for Supreme Court review, and the fundamental requirement for jurisdiction under 28 U.S.C. section 1257,

subdivision (a) is not met. Additionally, as to the issue of whether or not the twins are entitled to a custody hearing even if the ICWA applies, that surely is not ripe for review because there has been no final determination as to whether or not the ICWA will be applied in this case. Therefore, whether or not the ICWA issues are properly presented for review, surely the custody hearing and state-law guardianship issues are not properly before this Court because those issues only come into play after a judicial determination the ICWA applies in this case.

Furthermore, the petition is fraught with half-truths, procedural omissions and misstatements, and misrepresentations of fact and law. This, alone, justifies its denial. Chief among these is the repeated representation that Bridget and Lucy are "Indian children." The twins are not "Indian children" under the ICWA. That is the issue to be determined on remand. The twins are children of partial Indian descent whose biological parents never had any relationship with an Indian reservation or Indian culture. Specifically, they are only 3/32 Indian. Because the tribe's petition rests entirely on this false premise, it must be denied.

Moreover, the petition should be denied because the California Court of Appeal opinion was thorough, scholarly, and correct legally. The Court of Appeal had the benefit of extensive briefing and the assistance of numerous amicus curiae briefs from various organizations from throughout the nation. In contrast to various other state court opinions in which the constitutional issues have been dealt with in a summary fashion, this particular opinion includes extensive analysis of these issues after thoughtful consideration of the most recent opinions from this Supreme Court. The ICWA was never meant to apply to cases such as this in which neither the children nor their parents have had any significant social, cultural or political ties to a reservation or Indian life. To force children who are only of partial Indian descent and

who have no social tie to Indian life to be bound by the ICWA is to apply merely a genetic test. This is pure racial discrimination which is not permitted by the United States Constitution. Furthermore, to apply this Federal law to divest a state of its traditional role to determine matters of family law violates the Tenth Amendment to the United States Constitution and exceeds the enumerated powers of Congress.

Finally, the tribe's petition should be denied because the minors, who now are three years old, require some finality in their lives.

REASONS FOR DENYING THE PETITION

1. The Petition Should Be Denied Because This Case Is Not Final and, Therefore, This Supreme Court Lacks Jurisdiction under 28 U.S.C. Section 1257.

This Court lacks jurisdiction to grant certiorari because the Court of Appeal's opinion is not a "final judgment" under 28 U.S.C. section 1257. Although the opinion of the California Court of Appeal must be implemented by the trial court, there is no final decree that the twins are, or are not, "Indian" children under the ICWA. Therefore, this case is not yet in the appropriate posture such that certiorari may be granted.

The ICWA questions have been remanded for a new trial. Therefore, there is not a final judgment which this Court may review. (*Houston v. Moore*, 16 U.S. 433, 433 (1818).) As this Court ruled in *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395 (1900) :

> "This writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court." (*Id.* at 397.)

James and Colette are confident Richard, Cindy and the Rancheria will not be able to demonstrate on remand that Richard "maintain[ed] significant social, cultural or political relationships with the Tribe." (*In re Bridget R.*, 41 Cal.App.4th at 1513.) Therefore, the ICWA will not apply to this case at all, and the adoption will proceed. Even if the ICWA applies, James and Colette are confident they will be able to demonstrate "by clear and convincing evidence, including the testimony of qualified expert witnesses, that a change of custody to the biological parents would be detrimental to the twins" (*Id.* at p. 1520), and, therefore, they will maintain custody of the twins. However, a hearing on these issues is required, and there is at least a theoretical possibility Richard and Cindy will be successful. Because there remains a possibility Richard and Cindy will be able to establish the ICWA applies to this case and thereafter a possibility they will obtain custody of the children, this case is not yet final for the purposes of Supreme Court review.

One of the key questions here is whether constitutional issues are presented in a " 'highly abstract form' " and whether "further proceedings in the state court would ultimately tender 'the underlying constitutional issues in clean-cut and concrete form.' " (*Minnick v. California Department of Corrections*, 452 U.S. 105, 123 (1981).) Until the rehearing on the issue of the applicability of the existing Indian family doctrine to these particular litigants is completed, the questions in this case are being presented to this Supreme Court in an abstract form. In the case below, *no factual record on the constitutional issues and statutory issues was ever created*. The trial court specifically prevented the R.s' counsel from introducing evidence concerning the asserted connection, or lack thereof, with the tribe. (RT1 809 & 1109, RT 126.) This case cannot be final for the purposes of 28 U.S.C. section 1257 when a remand is necessary not merely to resolve ambiguities

but also to find the very facts essential to deciding the questions presented.

The requirement of finality "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' . . . ; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." (*North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).) This case implicates all three evils enumerated in *North Dakota Pharmacy Board*. First, a grant of certiorari at this stage would surely lead to piecemeal review by this Court of a state court decision. Without a complete factual record concerning the biological father's relationship to the Tribe, this Court cannot finally decide the questions petitioners claim are presented. A grant of certiorari will only delay the orderly unfolding of the case in the courts of California because, if certiorari is granted, this Court inevitably will be forced to remand the case for the fact finding which petitioners now seek to avoid. The proper procedure is to await a final judgment at the trial court, appeal through the California system, at which point the federal statutory and constitutional issues will probably be ripe for adjudication by this Court.

Second, this case presents the danger of issuing advisory opinions in the absence of a real case or controversy. The statutory, equal protection, due process, Indian Commerce Clause and Tenth Amendment questions which petitioner claims are presented in this case are not final and will not be ripe for review until petitioner (1) fails to prevail in showing that Bridget and Lucy are "Indian" children, and (2) the biological parents fail to prevail in a guardianship hearing. Most particularly, in order to address the question of whether Bridget and Lucy have a due process right to a guardianship hearing, this Court would necessarily be rendering an advisory opinion,

since this statement in the California Appellate Court's opinion will never be applied to resolve an actual case and controversy unless and until the trial court, after hearing all the evidence, finds Lucy and Bridget are "Indian" children.

Third, the evil of unnecessary federal court intrusion in state affairs is especially salient in this case. The Supreme Court of California did not hear and decide this case on the merits, nor did it uphold a final judgment conclusively denying petitioners the relief they seek. It simply denied review of the appellate court opinion which had remanded the matter to the trial court for an evidentiary hearing. Petitioners seek to circumvent the state court fact finding and to take their case straight to this Court, bypassing the process of the California court system.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court explained:

> "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '(f)inal judgment or decree.' Title 28 U.S.C. § 1257 retains this limitation on our power to review cases coming from state courts. The Court has noted that '(c)onsiderations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " (*Id.* at pp. 476-477, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).)

Although *Cox* went on to describe specific exceptions to the finality rule, this Court later explained:

> "[W]e observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues." (*Flynt v. Ohio*, 451 U.S. 619, 621 (1981).)

Not one of the exceptions discussed in *Cox* allows review in the face of a pending state court remand for fact-finding which the Court of Appeal has held is essential to its ability to render a judgment on the very constitutional and federal claims raised in the petition for certiorari. Because the federal issue of whether or not the existing Indian family doctrine is applicable to these particular litigants is the question to be resolved on remand, a subsequent appeal from that retrial – and probably a subsequent petition for writ of certiorari to this Supreme Court – are inevitable. This would result in piecemeal review of the questions involved in this case which would be inappropriate. Therefore, none of the ICWA issues presented are properly presented for review by this Supreme Court.

Essentially, the California Court of Appeal accepted the R.s' "as applied" challenge to the constitutionality of the ICWA. By definition, such a challenge must involve fact-finding before it truly is ripe for review by this Supreme Court. The Petition for Writ of Certiorari asks this Court to review this "as applied" statutory and constitutional challenge without the benefit of judicial findings regarding the specific situation of these parties. Petitioner's brief is rife with assertions of fact which involve disputed allegations, turning on issues of credibility and weight of evidence. Since only the trial court on remand has the capacity to resolve disputes of fact and develop the record necessary to deciding the statutory and constitutional issues, a final judgment has not been

rendered. Because that fact-finding has not yet occurred, the petition must be denied.

2. The Petition Should Be Denied Because It Relies on Numerous Misstatements of Fact and Law.

Rule 15(2) requires opposing counsel to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The tribe's petition contains numerous misstatements of both fact and law which bear on the issues in this case. Respondents have set forth above a statement of case which fills in some of the gaps left by many of the factual omissions of the petition. However, the omissions are not as glaring as the misstatements of fact and law in this case which require the petition be denied.

The most egregious of these misstatements is the repeated refrain Bridget and Lucy are "Indian" children. They are not "Indian" children, either factually or legally. Even more disturbing is the tribe's refrain its contention the twins are "Indian" children is "uncontroverted." (Pet. p. 2.) Because that is the primary issue in this case, it is very hotly disputed indeed. Similarly, it is not "undisputed" the Court of Appeal's ruling "violates the express provisions of the ICWA." (Pet. p. 3.) The R.s, and assumedly the Court of Appeal, do indeed dispute this. The issue in this case is whether the ICWA applies at all, not whether or not its provisions were violated.

To some extent, this point is related to the previous argument that this case is not yet ripe for review. That issue has yet to be decided on remand. Until there is a ruling the twins come within the meaning of "Indian child" within the meaning of the ICWA, they are not legally "Indian" children for purposes of the ICWA. That will not occur until the hearing on the existing Indian family issues on remand. Therefore, the twins are not

"Indian" children for purposes of the ICWA at this time, and the petitions pronouncements to the contrary are misstatements of law.

Neither are the twins "Indian" children factually. They are only 3/32 Indian by "blood." Neither of their biological parents was raised in an Indian cultural setting. Richard identified himself more with his European ancestry than his Pomo genetic heritage. Bridget and Lucy are simply not "Indians." Because the petition is premised upon this erroneous factual assumption, it should be denied.

Additionally, it is not a "fact" that "the natural father of Bridget and Lucy, and Bridget and Lucy R. are now, and always have been, members of the Tribe since their birth." (Pet. p. "xiv".) The improper retroactive enrollment of Richard and the twins is one of the legal issues the R.s contested throughout the trial and continue to contest in this Supreme Court as well. More than a year after the twins' birth and placement for adoption, the tribe "resolved" on November 15, 1994, that Richard was a tribal member and the twins were eligible for membership. (CT 2107.) Neither Richard, who was born in 1972, nor his mother Karen, who was born in 1952, appear on the 1977 list of tribal members. (CT 3194-3198.) Furthermore, the Rancheria's own articles require a tribal member to have submitted an application for membership, which Richard did not do in this case. The R.s continue to contest the question of whether or not Richard was a "member since birth" of the tribe and whether or not a state court must recognize without question the tribal assertion of membership. In the event this Court does grant the petition for certiorari, the R.s request this Court determine the validity of the dubious retroactive enrollment procedure as a matter fairly included in the larger question of whether or not the twins are "Indian" children under the ICWA because resolution of this issue is a "predicate to an intelligent resolution" of this question.

(*Vance v. Terrazas*, 444 U.S. 252, 258-259, fn. 5 (1980), Sup.Ct.R. (14)(1)(a).)

Another pivotal misstatement of fact and law appears on page "xvi" of the petition which states, "Richard then sent a letter to Vista Del Mar withdrawing his consent to the adoption. . . . " Richard signed a relinquishment, not a consent. These are two separate and distinct documents under California law. A "relinquishment" is used in the agency adoption setting in this case and effects a final termination of parental rights once filed with the state Department of Social Services in Sacramento. (Cal. Fam. Code § 8700.) A "consent" is a different formal document which could be withdrawn only after a hearing at which the trial court finds it is in the child's best interest to do so. (See former California Family Code section 8815, subdivision (a) ["Consent of a birth parent to the adoption of the child by the prospective adoptive parent or parents may not be withdrawn except with court approval"] and subdivision (d) ["If the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances and that withdrawal of the consent is in the child's best interest, the court shall approve the withdrawal of the consent."].) A "relinquishment" in California is, and always has been, a much firmer and irrevocable procedure for placing a child for adoption than that involved with a "consent." A birth parent cannot "withdraw" either a relinquishment or a consent by sending a letter.

Additionally, the R.s continue to object to any reliance on the "report" of Dixie Noble (Pet. p. "xvii") in that it was never admitted into evidence; Ms. Noble never testified in court; and the R.s never has an opportunity to cross-examine her. Although it is physically present in the clerk's transcript, it never became part of the formal trial record in this case, and Ms. Noble's conclusions, which were never tested in a court of law, are irrelevant.

Because of these numerous misstatements of fact and law, the petition for writ of certiorari must be denied.

3. The Statutory Interpretation Issue Concerning the Existing Indian Family Doctrine Is Not Properly Presented to this Supreme Court for Resolution.

The fact-intensive questions surrounding the existing Indian family doctrine are not properly before this Supreme Court. As the Court of Appeal noted: "Because the trial court was persuaded that enrollment in the Tribe and tribal recognition of the twins' tribal membership were enough to trigger the application of the ICWA, the court had no occasion to make a further factual determination as to whether the biological parents maintain significant social, cultural or political relationships with the Tribe. The case must therefore be remanded so that such factual determination can be made." (*In re Bridget R., supra,* 41 Cal.App.4th at pp. 1512-1513.) Because those factual determinations are yet to be made, petitioners are asking this Supreme Court decide the question of the applicability of the existing Indian family doctrine in a vacuum. Furthermore, even though various states do not speak with one voice on this issue, the cases in which the existing Indian family doctrine has been addressed generally all possess unique fact patterns in which the various state courts apply, or reject, different versions of the doctrine within different contexts. Because these cases are so uniquely fact-based, they do not call out for review by this Supreme Court.

ICWA cases arise in the foster care context (see, *In the Matter of S.C.,* 833 P.2d 1249 (Okla. 1992); *Matter of Adoption of a Child of Indian Heritage,* 111 N.J. 155, 543 A.2d 925 (1988)); intra-family custody disputes (*A.B.M. v. M.H. & A.H.,* 651 P.2d 1170 (Alaska 1982), *cert. denied sub. nom Hunter v. Maxie,* 461 U.S. 914 (1983); *In re the Custody of A.K.H.,* 502 N.W.2d 790 (Minn.App. 1993)); voluntary adoptions (*Matter of Adoption of T.R.M.,* 525 N.E.2d 298

(Ind. 1988) *cert. denied sub. nom J.Q. v. V.D.R.L.*, 490 U.S. 1069 (1989); *In re Hampton*, 658 So.2d 331, 334-335 (La.App. 1995) *cert. denied sub. nom J.A.L. v. Hampton*, ___ U.S. ___, 116 S.Ct. 1549 (1996)); and even a custody dispute arising after artificial insemination for the purposes of gestational surrogacy *Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989) *cert. denied sub. nom Jasso v. Finney*, 494 U.S. 1030 (1990).) The context in which ICWA cases arise and the various factual situations dealing with whether or not the biological parents are domiciled on reservations or have significant, little or no connection with tribal culture compels the conclusion the resolution of these cases is best left to the various states applying their specific state statutory schemes. A careful review of the decisions from the various states reveals the law concerning the existence and applicability of the existing Indian family doctrine is still developing and, therefore, granting this petition for writ of certiorari would be premature at this time.

This case which most closely mirrors the case at bench is *Matter of Adoption of Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992). There, the biological mother had voluntarily placed her child with an agency for adoption and later sought to have her consent invalidated because it had not been taken in conformity with the ICWA. (*Id.*, at 307.) The court declined to apply the ICWA to invalidate the adoption because the minor's parents had never had any tie to any Indian tribe or community, although the mother was of Indian descent, and the child was eligible for tribal enrollment. The *Crews* court noted this conclusion was in accord with this Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), stating:

> "The [Supreme] Court stated the application of ICWA could not be defeated by the actions of the parents. In so holding, however, the court

made clear that the purpose of ICWA was to avoid the

> '[r]emoval of Indian children from their cultural setting [because such removal] seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'

"[Citation.] Thus, *Holyfield* supports our conviction that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation. In such a situation, whether or when a child meets the definition of 'Indian child' under ICWA is not controlling." (*Id.*, at 825 P.2d 310-311.)

Therefore, the *Bridget R.* ruling is consistent with the case which most closely resembles the facts presented in the instant case. Additionally, it is also important to note the various districts of the California Court of Appeal have not unequivocally decided exactly how to address the existing Indian family doctrine. Shortly after the publication of *Bridget R.*, another District of the California Court of Appeal specifically disagreed with a portion of *Bridget R.*, stating:

> "We agree with *Bridget R.* that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA. But we disagree with its holding that the doctrine *cannot* come into play unless the child *and* both his parents lack a significant relationship with Indian life. We are not willing to so limit the doctrine. As demonstrated by our review of the cases, whether there is an existing Indian family is dependent on the unique facts of each situation." (*In re Alexandria Y.*, 45 Cal.App.4th 1483, 1493, 53 Cal.Rptr.2d 679 (1996), *original emphasis.*)

The law in this area not only continues to develop around the country, but also within California. Therefore, not only is this issue not properly before this Supreme Court in this instant case because the matter was remanded for a factual hearing on this point, it is also premature for this Supreme Court to grant certiorari on this issue before any clear lines of authority develop around the country. The petition for certiorari should be denied.

4. The Question of Whether or Not Application of the ICWA to this Particular Case Denies the Twins Equal Protection of the Laws Is Not Properly Presented to this Supreme Court.

As with all the issues in this case, the equal protection question is not properly before this Supreme Court for resolution at this stage of the proceeding. The extent of the federal interest, if any, and the extent of the tribe's interest, if any, in these twins cannot be determined until the trial court holds its evidentiary hearing on these points on remand. Therefore, any opinion by this Supreme Court would be advisory only.

Furthermore, petitioners continue to rely on the inapposite case of *Morton v. Mancari*, 417 U.S. 535 (1974). The California Court of Appeal's decision in this case is consistent with settled precedents such as *Morton*, which dealt with a challenge to preferential hiring of Indians by the federal government for employment in the BIA. (*Morton v. Mancari*, 417 U.S. at. 545.) In defeating a challenge asserting the hiring preference constituted invidious racial discrimination, this Court ruled the preference was not racial discrimination but, rather, was only "an employment criterion reasonably designed to further the cause of Indian-self-government. . . . " (*Id.* at 554.) This Court noted "the preference applies only to employment in the Indian service." (*Ibid.*) *Morton* reiterated the context in which Indian legislation – which if affecting any other

ethnic group would be stricken as racially discriminatory – has been permitted is the context of reservation Indians or Indians somehow connected with a reservation coming under the purview of the federal government. (*Id.* at 552-553.) Until the trial court makes its determination on remand as to the extent to which Richard is or is not connected with tribal culture, the extent to which *Morton's* rationale is relevant here cannot be determined.

Furthermore, this Supreme Court also noted the difference between "tribal" Indians and individuals "who are racially to be classified as 'Indians' " in *United States v. Antelope*, 430 U.S. 641, 646, fn. 7 (1977) (*internal quotes omitted*) and again recently in *Oklahoma Tax Commission v. Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 2217, 2223 (1995). This Supreme Court addressed an equal protection challenge to Indian legislation in *Delaware Tribal Business Commission v. Weeks*, 430 U.S. 73 (1976), in which this Court explained it would continue to scrutinize "Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment [Citation] [and that] '[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' [Citation.]" (*Id.*, at 84.) Therefore, Federal Indian legislation is not immune from judicial scrutiny carried out in the context of a constitutional analysis. The Court of Appeal's opinion in the instant case is completely consistent with these precedents.

The Court of Appeal's opinion was correct, and consistent with the law not only from this Supreme Court, but also with the law from other jurisdictions. Most importantly, until the extent of the federal or tribal interest is determined, any ruling by this Supreme Court would be advisory only. The petitions should be denied.

5. The Issue Concerning Whether or Not the Application of the ICWA to this Case Violates the Twins' Right to Due Process of Law Is Not Properly Presented to this Court.

Although the tribe references the due process issue in the second issue in its "questions presented" portion of the petition, no comprehensive discussion of that issue is presented in the petition. However, for the sake of completeness, the R.s note the due process questions, as well, are closely tied to the result of the evidentiary hearing on remand. Because the outcome of this issue hinges on the outcome of the upcoming evidentiary hearing, the jurisdictional requirement of 28 U.S.C. section 1257 has not been met, and the petition for certiorari must be denied.

Furthermore, there is an additional ground upon which affirmance of the Court of Appeal's opinion would be proper as to this issue. The Court of Appeal also stated: "The R's, as the prospective adoptive parents, similarly have no interests which have been found to enjoy *constitutional* protection. (*Smith v. Organization of Foster Families* [citation]." (*In re Bridget R.*, 41 Cal.App.4th at 1507, *original emphasis.*) Strictly speaking, that statement is accurate. However, the R.s have always asserted they *do* have a constitutionally-protected interest against which the application of the ICWA has to be weighed. Although no case precisely has held pre-adoptive parents have such a constitutionally-protected interest, analogous cases have held that individuals in similar situations do have protected interests. (See, *Brown v. County of San Joaquin*, 601 F.Supp. 653, 664-665 (E.D. Cal. 1985); *In re Jamie G.*, 196 Cal.App.3d 675, 683, 241 Cal.Rptr. 869 (1987).) Once the relinquishments signed by Richard and Cindy were filed in Sacramento, the parental rights of the birth parents were terminated under California Family Code section 8700. At that time, because the twins' caretakers had a valid right to complete the adoption process

under state law, the R.s' interests attained constitutionally-protected status. In the event this Supreme Court grants the tribe's petition for writ of certiorari, the R.s request this Court also consider whether or not they have a constitutionally-protected due process interest in the care, custody and control of the minors as well. Because the R.s have constitutionally-protected liberty interests as well, there must be a compelling Federal interest to remove the twins from their care by applying the ICWA. Because of twins' and the parents' complete lack of connection to the Rancheria in this case, there is no such interest.

Therefore, there is no valid basis upon which to grant certiorari as to this issue either.

6. The Issues of the Effect of the Enumerated Powers Doctrine and Tenth Amendment Are Not Properly Presented to this Supreme Court.

As with all the other issues advanced by petitioners, the argument the Court of Appeal was incorrect in its Indian Commerce Clause and Tenth Amendment analysis rests on the fundamental misconception the twins at issue in this case are both "Indian" children as well as "Indian" children who have had some significant tie to a reservation or Indian culture. These are the issues to be determined on remand. Because it has not been determined yet whether or not the twins who are the subject of this case are "Indian" children, the tribes' extensive discussion of the Tenth Amendment issue is not relevant for purposes of review by this Supreme Court.

Furthermore, the Court of Appeal was correct on the substance of these points. The Indian Commerce Clause does not empower Congress to pass a law stripping a state court of its authority over a child within the geographical boundary of that state if neither the child nor the parent has any significant social connection to a reservation or Indian culture. Therefore, at the very least,

Congress exceeded its enumerated powers when it enacted those portions of the ICWA which purport to affect children of partial Indian descent whose parents are not reservation domiciliaries. 25 U.S.C. section 1911, subdivision (a), which deals with the exclusive jurisdiction of an Indian tribe "over any child custody proceeding involving an Indian child who resides on or is domiciled within the reservation of such tribe," may be within the enumerated powers of Congress. However, most of the balance of the ICWA exceeds the enumerated powers of Congress and is unconstitutional if applied to children of partial Indian descent who are not reservation domiciliaries. Certainly the attempted application of the ICWA to the twins at issue in this particular case who were not reservation domiciliaries and whose father had little or no contact with the reservation his entire life exceed the enumerated powers of Congress and is an unconstitutional application of the ICWA.

As for the Tenth Amendment issue, even though it is true the court *In the Matter of the Guardianship of D.L.L. and C.L.L,* 291 N.W.2d 278 (S.D. 1980) found no Tenth Amendment violation (*Id.* at p. 281), that case is distinguishable because it involved tribal Indians. Moreover, the analysis by the Court of Appeal in the instant case is much more extensive than that of *D.L.L.* court and relies principally on this Supreme Court's recent case of *United States v. Lopez* ___ U.S. ___, 115 S.Ct. 1624 (1995). As such, it rests on a much firmer foundation and should not be disturbed by this Supreme Court. Furthermore, *D.L.L. and C.L.L.* and the instant case are the only two cases which have addressed directly the Tenth Amendment issue in the ICWA context. Two cases do not a raging conflict make. Rather than grant the certiorari petition at this time, this Supreme Court first should permit the individual states to work this issue out in the context of specific factual situations before granting certiorari on this point

in addition to permitting the California court to resolve the factual issues presented in this specific case.

7. The Tribe Has Waived Its Preemption Arguments Because It Did Not Raise Them in the Lower Courts.

At page 14 of its petition, the tribe begins a federal preemption argument it is raising for the first time in this certiorari petition. Indeed, it has not even included that argument among the "questions presented" at the beginning of its petition. Because this issue has not been raised before, certiorari should not be granted on this point. (*Youakim v. Miller*, 425 U.S. 231, 234 (1976).)

8. The Question of Whether or Not the Twins Are Entitled to a Custody Hearing Does Not Meet the Jurisdictional Prerequisite for a Grant of Certiorari.

The tribe did not include any discussion in the petition of the fourth issue of the "questions presented," that of whether or not a custody hearing is required even if the ICWA applies. Because the tribe has provided no reason why certiorari should be granted as to this issue, this court should not grant certiorari of this question presented.

Even though the tribe presented no discussion of this issue, the R.s point out the lack of jurisdiction under 28 U.S.C. section 1257, subdivision (a), is even more apparent as to the issue of whether the twins are entitled to a hearing under California guardianship law in the event the ICWA is held to apply to this case. Until there is final determination by a California court that the ICWA applies to this case – which may never happen if the trial court on remand finds the existing Indian family doctrine precludes the application of the ICWA – no court will even need to consider whether or not a custody hearing is required. The grant of certiorari as to this issue would result in an advisory opinion only.

Even if this Supreme Court considers the issues concerning the Existing Indian Family Doctrine and whether or not the ICWA may be constitutionally applied to this case, certiorari should not be granted as to this issue because it is, at this time, too abstract for Supreme Court consideration. Not only must there still be a hearing on remand to determine whether or not the ICWA may be applied to this case, Richard must be successful at that hearing before the California trial court will reach the custody/guardianship issue.

9. The Petition Should Be Denied Because the Twins Need to Have this Matter Resolved as Expeditiously as Possible.

Finally, the R.s urge this Court to deny the petition for certiorari because it is in the best interest of all concerned to have this matter resolved as soon as possible. If the petition is granted, the inevitable result will be to prolong resolution of this matter for an additional year before retrial of the existing Indian family doctrine issues. The parties in this adoption case require resolution of these issues as soon as possible. Therefore, to expedite the resolution of this case, the petition should be denied.

CONCLUSION

Because the resolution of the issues in this case depends on the evidence adduced at trial on remand, this case does not meet the fundamental jurisdictional prerequisites for granting a petition for writ of certiorari. Furthermore, the Court of Appeal's opinion was thorough, scholarly and well-reasoned. Because it was correct in law and properly handled several difficult issues, it should not be disturbed. Finally, this Supreme Court has already denied the petition filed by Richard and Cindy

which raised, essentially, questions which were identical to those raised in the tribe's petition. The tribe's petition for a writ of certiorari should be denied as well.

Respectfully submitted,

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